No. 12,452

IN THE

United States Court of Appeals

For the Ninth Circuit

SAM GAILBREATH,
Appellant,

vs.

THE HOMESTEAD FIRE INSURANCE COMPANY and SUN INSURANCE OFFICE, LIMITED,
Appellees.

Appeal from the United States District Court, Northern District of California, Northern Division.
Honorable Dal M. Lemmon, Judge.

APPELLEES' REPLY BRIEF.

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STATEMENT OF PLEADINGS.

The complaint contains two causes of action. The first cause of action is on behalf of appellee The Homestead Fire Insurance Company, a corporation organized and existing under the laws of the State of Maryland and licensed to engage in the business of fire insurance in the State of California; the second cause of action is on behalf of appellee Sun Insurance Office, Limited, a corporation organized and ex-

isting under the laws of England and licensed to engage in the business of fire insurance in the State of California (Transcript* p. 5).

The gravamen of each cause of action is that each appellee issued a fire insurance policy to Herold Lumber Company (hereinafter called Herold), whereby each appellee insured Herold against loss and damage by fire to a certain building and personal property situate therein; that on the 31st day of October, 1946, appellant's employees, Cerino Lemos (hereinafter referred to as Lemos) and Harry Gregory (hereinafter referred to as Gregory), acting in the scope of their employment, carelessly and negligently installed, controlled and tested a certain oil burning stove in such building and did thereby cause a fire in such building, which destroyed the building and a portion of said personal property, and by reason of such destruction each appellee paid Herold a certain sum of money in excess of the sum of Three Thousand Dollars ($3,000.00) under its respective fire insurance policy, and by reason of such payments each appellee became subrogated to the rights of Herold against appellant, who negligently caused such fire (T. 3-7, inc.).

The answer of appellant denied each material allegation of the complaint. The answer did not raise any other defense.

At a pretrial conference, appellant admitted each allegation of the complaint, except the allegations of

*Hereinafter referred to as "T."

negligence and proximate cause (T. 51-52, 73) and the only issues before the trial court were negligence and proximate cause.

STATEMENT OF CASE.

There are certain basic facts shown by the evidence, which may be described as follows:

1. At all times appellant's business was the sale and installation of oil stoves. Gregory and Lemos were his employees. Prior to this fire, Gregory had worked for appellant for four to five years and Lemos had worked for appellant for two and one-half to three months. Their duties included the installation of stoves (T. 80, 103, 113, 136).

2. The building was a new frame lumber shed situated upon approximately two acres of ground at Auburn, California (T. 35), and was constructed by Lars Wold, a building contractor (T. 120). The building was approximately 32 feet wide and 64 feet long and was constructed of fir timber and siding. In the southwest corner of the building an office was constructed, approximately 16x16 feet. There were two windows each on the south and west sides of the office and it had two doors (T. 36).

In the office, there was a wooden counter set about three feet from the south wall. The counter was approximately 22 inches wide, 40 inches high and 13 feet in length. There were two wooden desks and a telephone (T. 37).

3. The fire occurred on October 31, 1946, shortly before 5:00 o'clock P.M. (T. 69).

4. Approximately one week prior to the fire, Charles W. Little (hereinafter referred to as Charles), yard manager for Herold, went to appellant's place of business to purchase a stove for the office. Appellant agreed to sell Herold such a stove, the necessary tubing, pipes and fittings and to install the same (T. 38-39).

5. The following events occurred on the day of the fire:

(a) In the morning, Charles sent one of Herold's employees, Roy Albers, to pick up the stove at appellant's (T. 43). Appellant delivered to Albers a Customaire Oil Stove with 35,000 b.t.u. capacity, which was in a crate (T. 27, 40, 82). Albers hauled the crated stove to the office, where he placed it behind the counter. Albers removed the top of the crate to look at the stove but did not remove the stove from its crate nor install the stove (T. 27, 28, 29).

(b) About midday, appellant instructed Lemos to take an oil drum, oil and some fittings to Herold's, which Lemos did in appellant's service pickup truck (T. 29, 104). Charles told Lemos where to place the oil drum and to run the copper tubing under the floor of the building (T. 58-59).

While the carpenters employed by Wold were completing the platform for the oil drum on the westerly side of the building, Lemos took the copper tubing, which was to carry the oil from the oil drum to the

stove, and laid it out under the building. Lemos requested one of the carpenters to locate the 2x4's under the floor, which an unidentified carpenter did, and drilled a hole for the tubing. Lemos then poked the tubing through the hole. Lemos filled the drum, put a valve on the copper tubing and connected it to the drum (T. 105-108). Lemos remained at Herold's until around 4:00 o'clock P.M. (T. 116).

(c) Around 2:00 or 3:00 o'clock P.M., appellant's other employee, Gregory, arrived at Herold's to install and test the stove. Gregory set the stove up and connected the tubing to the stove (T. 129, 150-151). The stove was 12 to 24 inches from the easterly wall of the office, which was the nearest wall to the stove (T. 66, 110, 124).

(d) Around 4:00 o'clock P.M., Charles' brother, Jack E. Little (hereinafter referred to as Jack). entered the office, where he saw Gregory and another man, whom he was unable to identify, working on the stove. At this time, Glenn Carns, a salesman for Herold, was also in the office and some carpenters were working on the counter (T. 64, 69). Jack remained in the office for a few minutes and then went into the lumber yard, but was in and out of the office several times until he reentered the office shortly before 5:00 o'clock P.M. to make some telephone calls (T. 65, 69).

(e) Shortly before 5:00 o'clock P.M., while talking on the telephone to his brother Charles, Jack was standing behind one of the desks and facing the stove. Jack saw Gregory take a rag and mop up the

floor under the stove. When he completed the wiping up, Gregory opened up the port of the stove and threw in a lighted match; then there was a "sort of puff" and a square of fire appeared under the stove in the area where Gregory had wiped up the floor. Gregory took his jacket and attempted to beat out the fire, but the fire spread and Gregory attempted to pick up the stove but dropped it on its side (T. 67).

(f) At the time of the fire, the only persons in the office were Jack, Gregory and the unidentified man who was working on the stove with Gregory when Jack had entered the office around 4:00 P.M. (T. 66). The pickup truck, which appellant's employees drove to Herold's, was still outside the office (T. 33).

6. The day before the fire, the office was painted by Herold's employees. On the day of the fire, these employees painted a portion of the floor behind a door and the front of the counter. Standard Oil floor hardener was used and takes approximately 24 hours to dry (T. 56-57, 63, 128). Such hardener has a flash point of 105 degrees Fahrenheit (T. 76).

Wooden boards were placed on the floor after it was painted to protect the floor from persons walking in and out of the office (T. 122, 127).

Appellant had full knowledge concerning all painting which was done on the day of the fire in the office. His employee Lemos saw such painting being done and his other employee, Gregory, knew it was freshly painted before he ignited the match and threw it into the port (T. 107, 138).

7. Building contractor Wold obtained a building permit to install a flue in the office. It was a patent flue with terracotta lining and aluminum casing. The top of the flue outlet was twelve inches from the ceiling and extended into the wall through a "T" and up through the roof of the building (T. 122-123). The flue was properly installed and passed by an inspector prior to the fire (T. 128).

8. Wold's employees did not have anything to do with the installation of the stove (T. 124). Herold's employees did not install the stove (T. 162, 163).

ARGUMENT.

The trial court found that the fire was proximately caused by appellant through the negligence of his employees in installing, controlling and testing such stove. Paragraph VI of the Findings of Fact reads as follows:

> "It is true that on October 31, 1946, said Cerino Lemos and Harry Gregory who were then acting in the course of their employment as the employees of said defendant Sam Galbreath, so carelessly and negligently installed, controlled and tested a certain oil burning stove then under their sole control in said building as to cause, and they did cause, a fire to start in said building which fire resulted in the destruction of said building and part of stock of lumber." (T. 17-18.)

It is settled law that on an appeal, even though there is a conflict in the evidence, this court will

assume as true the view of the evidence most favorable to appellee,

Wilmington Transp. Co. v. Standard Oil Co. (1931 C.C.A. 9th) 53 F. (2d) 787.

The evidence shows that appellant agreed to install this stove; that two of his employees, Gregory and Lemos, installed the stove and with full knowledge of the fresh paint his employee Gregory threw a lighted match into the port of the stove, which was immediately followed by a puff and a fire appeared on the floor directly below the stove in the area which Gregory had mopped up with a rag immediately before striking the match; that Gregory took a coat to beat out the fire but the beating caused the fire to spread to the east wall; that Gregory picked up the stove and dropped it on its side and the building was destroyed by fire.

It is appellees' position that the evidence shows negligence on the part of appellant and that, if it does not support a finding of negligence, the doctrine of *res ipsa loquitur* will apply and support such finding of negligence.

I.

THE DECISION OF THE TRIAL COURT IS SUPPORTED BY THE EVIDENCE.

A. Appellant's business included the sale and installation of such stoves.

Appellant has admitted that his business included the delivery of fuel oil for and the sale and installation of such stoves and that Gregory was employed by him and as a part of his work installed such stoves (T. 80). Gregory testified that prior to this fire, Lemos also installed stoves for appellant (T. 136).

B. Appellant agreed to install stove.

About one week before the installation of the stove, appellant informed Charles, Herold's yard manager, that he would sell Herold the stove, furnish the necessary parts and install the same.

Under direct examination, Charles W. Little testified in part as follows:

"Q. Now, are you acquainted with Sam Galbreath?

A. Yes.

Q. How long have you known him?

A. About ten years.

Q. And during that time have you done any business with him?

A. Oil—stove—

Q. And during the month of October, 1946, did you have any conversation with him concerning a heating system or a heating unit for that office?

A. I did.

Q. Where did that conversation take place?

A. In his office.

Q. Who was present?

A. Well, I don't remember if there was anybody present; probably some one of his employees may have been in and out.

Q. Whom did you talk to at that time?

A. Sam.

Q. What was your discussion?

Mr. Desmond. Will you fix the date?

Q. (By Mr. Castro). Can you fix that date with relation to when you had a fire at the lumber company?

A. Previous.

Q. About how long previous?

A. It may have been a week.

Q. And what was that conversation?

A. To see whether or not he could furnish me a stove.

Q. And was he able to furnish a stove?

A. He said he could, yes.

Q. And, did he give you any description or name of the stove?

A. Well, no, any more than we discussed the size of the stove necessary to heat the area that was to be heated.

Q. And what size of stove was it to be?

A. That I can't tell.

Q. Now was there any discussion concerning the installation of the stove?

A. No more than he had the necessary tubing, pipe and fittings and would install it." (T. 38-39.)

C. Appellant's employees installed the stove.

Around midday, on the day of the fire, at appellant's instruction, Lemos drove appellant's service

pickup truck to Herold's with the necessary fittings for the installation of the oil drum and stove (T. 104). Lemos arrived at Herold's shortly after lunch (T. 116). Herold's yard manager, Charles, informed Lemos where the oil storage drum was to be placed and requested Lemos to run the tubing under the building (T. 44). Between 2:00 and 3:00 P.M., Gregory, appellant's other employee, who had installed stoves for several years for appellant, arrived at Herold's (T. 130). Later, Charles, who was working in the lumber yard, saw Lemos with Gregory and saw Gregory going in and out of the office (T. 45-46). Lemos admitted that before Gregory arrived, since Herold had bought the stove, he decided to give him service and hooked up the oil drum (tank) to the copper tubing (T. 108), ran the tubing from the drum under the building through a hole in the floor, drilled by a carpenter at his request (T. 105-106). After the tubing had been run through the floor, the building contractor, Wold, saw Lemos around the office (T. 125) and the only other persons Wold saw in the office were two painters, who were painting the counter (T. 121, 126-127).

At his home, Gregory admitted to John O'Malley, in the presence of appellant, that he worked on the stove for about two and one-half to three hours, connected the tubing from the tank to the stove, turned on the valve for the oil, watched the oil flow into the stove for a couple of seconds, than threw a lighted match into the stove and the fire immediately occurred. O'Malley made written notes of the con-

versation, which Gregory signed (T. 149-152). Under cross-examination, Gregory admitted he talked with O'Malley and placed his signature on the notes (T. 142) and Gregory did not deny that he made such statements (T. 140). Likewise, appellant, when called as a surrebuttal witness on his own behalf, admitted he took O'Malley to Gregory's residence, that O'Malley talked to Gregory and took notes of what was said, and Gregory signed the notes; and appellant did not deny that Gregory made such statements to O'Malley (T. 167).

When interrogated by the trial court, Gregory admitted that he went to Herold's "to take care of things in case there was anything ever would happen to it" (the stove), as follows:

> "Q. (By the court). What were you doing there that day at all?
>
> A. Well, we sold the stove to these people and naturally I was just trying to be—to stay there and take care of things in case there was anything ever would happen to it." (T. 137.)

> "Q. I can't understand why you would be there just to see if anything happened. Did you inspect to see if it was all right?
>
> A. I knew that Mr. Galbreath sold them the stove and I thought maybe I would just stay there until—and see if there was anything—if there was anything went wrong with the thing." (T. 138.)

D. Appellant's employees, Lemos and Gregory, had full knowledge that the office was freshly painted.

According to Lemos' testimony, Lemos saw two painters painting the walls (T. 107) and Gregory admitted he knew the office had been freshly painted (T. 138).

E. Appellant's employee Gregory ignited the fire.

Jack testified that shortly before 5:00 P.M. on the day of the fire, he entered the office to telephone. While telephoning, he was facing the stove and saw Gregory do these acts: Gregory took a rag, wiped up the floor under the heater and then opened the port of the stove and threw in a lighted match, which was immediately followed by a puff and a square of fire appeared under the stove in the same area that Gregory had just wiped up. Gregory took a jacket and attempted to beat out the fire. The fire spread and Gregory tried to pick up the stove but dropped it on its side. The fire started up the inside wall, across the ceiling and down the other side of the room (T. 66-68).

II.

DECISION OF THE TRIAL COURT IS NOT AGAINST THE LAW.

A. Negligence may be proved by circumstances.

While the burden of proof was upon appellees to prove negligence on the part of appellant as a proximate cause of this fire by a preponderance of

the evidence, such rule does not require demonstration or absolute certainty because such proof is rarely possible,

Kennedy v. Minarets & Western Ry. Co. (1928) 90 Cal. App. 563, 266 Pac. 353;

Hall v. San Joaquin L. & P. Corp. (1935) 5 C.A. (2d) 755, 43 P. (2d) 856—fire due to defective wire;

Hilson v. Pacific Gas & Electric Co. (1933) 131 Cal. App. 427, 21 P. (2d) 662—insufficient gas pressure or faulty adjustment of burners;

Phillips v. Southern California E. Co. (1937) 23 C.A. (2d) 222, 72 P. (2d) 769—circumstantial evidence that fire started by arc from defendant's transmission line;

37 *Cal. L. Rev.* 189, n. 35, et seq.

The evidence shows that the fire was caused by appellant's employee Gregory, when, with full knowledge that the office had been freshly painted, Gregory, without considering whether such paint created a fire hazard, ignited a match and threw it into the stove, which act was immediately followed by a puff from the stove and flames appeared on the floor under the stove in the area Gregory had just wiped up with a rag, and Gregory attempted to beat out the flames but they spread and Gregory then attempted to pick up the stove, which fell on its side (T. 66-67).

Appellant has not offered any evidence to show that any other act occurred between the wiping up of the floor and the fire.

If the paint created a fire hazard, as contended by appellant at pages 7, 9 and 10 of his opening brief, and the rapidity with which the fire spread is evidence of the hazard created by the painting, then it was the duty of appellant's employees, who had knowledge of such paint, in the exercise of ordinary care, to take some precautions against such fire hazard before Gregory attempted to ignite the stove.

It is an elementary rule of law that the amount of caution required by the law increases as does the danger that reasonably should be apprehended,

Roselip v. Raisch (1946) 73 C.A. (2d) 125, 166 P. (2d) 340;

McVay v. Central California Inv. Co. (1907) 6 Cal. App. 184, at 187, 91 Pac. 745.

The evidence does not disclose that any precautions were taken by appellant's employees. Whether, under the circumstances, any precautions should have been taken or whether the attempt to ignite the stove should have been made was a question of fact for the trial court to determine and the trial court has decided that appellant was negligent in attempting to ignite the stove.

Further, immediately before the fire appellant wiped something from the floor under the stove. Why this was necessary, the nature of the material wiped up, where it came from or whether it was inflammable was not shown by the evidence, but the evidence showed this area was the first place the fire developed after the "puff".

As stated in

Hilson v. Pacific Gas & Electric Co. (1933) 131 Cal. App. 427, 21 P. (2d) 662, at 664:

"More than one man has gone to the gallows upon circumstantial evidence not so strong."

In appellant's opening brief, at page 7 thereof, six causes of the fire are suggested by appellant, as follows:

That the fire was caused by:

"1. A defective flue;

2. A burning cigaret;

3. A carelessly thrown match;

4. Spontaneous combustion of a painter's rag;

5. Ignition of the Standard Oil floor hardener then being applied, which was known to be highly inflammable when exposed to normal heat; and

6. By the either careless or voluntary act of a third person." (Numbers inserted by us for reference clarity.)

As to the enumerated causes 1, 2 and 6, the evidence shows that as to "cause 1" the flue was a patent flue and a permit had been obtained by the contractor, Wold, for its installation; that it was properly installed and passed by an inspector as properly installed before the fire; further, there is no evidence that such flue contributed to the cause of the fire. If it did contribute to the fire, it was not a defense to appellant for, as stated in *Hilson v. Pacific Gas*

& Electric Co. (1933) 131 Cal. App. 427, 432, 21 P. (2d) 662, Wold's negligence, if any, would be concurrent with that of appellant, and either or both would be liable at the appellees' election (T. 128). As to "causes 2 and 6," the record does not show that any cigaret was burning or that any third person, other than appellant's employees, did any voluntary or careless act to cause the fire. On the other hand, as to enumerated "causes 3, 4 and 5," the evidence shows that the match was thrown by appellant's employee Gregory; that the only rag which was used was the rag which Gregory used to mop up the floor under the stove (T. 66-67) and that the painting of the floor and walls was known to both employees of appellant, Lemos and Gregory, (T. 113, 118, 140) and the record is silent as to any precautions taken by Gregory against such a fire hazard. Therefore, even though appellant did not intend to make such an admission of negligence, the evidence concerning enumerated causes 3, 4 and 5 demonstrates appellant's negligence and sustains the findings of the trial court that appellant was negligent in installing, controlling and testing the stove.

It is clear that a defendant cannot prevail as a matter of law upon a mere showing of circumstantial evidence which suggests another possible cause e.g., as in a case where a break in a power line might have been due to a rifle bullet. See, *Manuel v. Pacific Gas & Electric Co.* (1933) 134 Cal. App. 512 (25 P. (2d) 509), where the court said:

> "* * * as to the facts the jury were apparently not convinced by the theory of the break of ap-

pellant, and whether the break was due to the impact of the rifle bullet or to kinks in the line put in when the cable was strung or to a blow from an unknown tool, or to some other unexplained cause, was for them to determine."

Likewise, in this case it was for the trial court to determine what caused the fire.

B. Res ipsa loquitur applicable.

It is stated that the doctrine of res ipsa loquitur applies, "When a thing which causes an injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant that the accident arose from want of care."

Wright v. Southern Counties Gas Co. (1929) 102 Cal. App. 656, at 664, 283 Pac. 823;

Judson v. Giant Powder Co. (1895) 107 Cal. 549, 40 Pac. 1020;

Ireland v. Marsden (1930) 108 Cal. App. 632, 291 Pac. 912.

The doctrine has been applied to fire cases,

Rosclip v. Raisch (1946) 73 C.A. (2d) 125, at 134, 166 P. (2d) 340;

Davidson v. American Liquid Gas Corp. (1939) 32 C.A. (2d) 382, 89 P. (2d) 1103.

Also see:

Brown v. Standard Oil Co. (1917) 247 Fed. 303;

Hawes v. Warren (1902) 119 Fed. 978.

1. Right of control and management was in appellant.

The California courts have said that exclusive control is not limited to the actual physical control (which appellees contend appellant had), but applies to the right of control of the instrumentality which causes the injury,

Union Oil Co. v. Rideout (1918) 38 Cal. App. 629, 177 Pac. 196;

Metz v. Southern Pacific Co. (1942) 51 C.A. (2d) 260, 124 P. (2d) 670;

Hackley v. Southern Pacific Co. (1935) 6 C.A. (2d) 611, 45 P. (2d) 447;

Van Horn v. Pacific Refining & Etc. Co. (1915) 27 Cal. App. 105, 148 Pac. 951.

It is sufficient if appellant was in exclusive control at the time of the probable negligence,

Escola v. Coca Cola Bottling Co. (1944) 24 C. (2d) 453, 150 P. (2d) 436;

37 Cal. L. Rev. 199.

Even though title to the stove had passed to appellees, the doctrine of *res ipsa loquitur* still applied because appellant's employees took possession of the stove to install and test it and the fire occurred while they were lighting it after they had installed it.

Roselip v. Raisch (1946) 73 C.A. (2d) 125, 166 P. (2d) 340.

It was the testimony of Charles, that at the time he ordered the stove from appellant, appellant agreed to install it (T. 39). Although Charles sent Herold's employee, Albers, for the stove and Albers hauled the crated stove to the office and removed the

top of the crate to look at the heater, Albers did not do any other act towards the installation or ignition of the stove (T. 29). Charles did not install the stove himself or instruct any of the other three men employed by Herold's to install the stove, and as far as Charles knew they did not assist appellant in installing the stove. Further, Charles did not instruct Gregory how to install the stove (T. 162-164).

Appellant sent Lemos to Herold's with the service pickup truck with the fittings necessary to install the stove. Lemos arrived at Herold's shortly after lunch (T. 116). In order to give Herold service, Lemos connected the tubing to the oil storage drum outside the office, filled the drum, put a valve on the copper tubing and connected it to the drum, and ran the tubing under the building and through the floor (T. 105-108). Between 2:00 and 3:00 P.M., appellant's regular stove installer, Gregory, arrived at Herold's (T. 129). Around 4:00 P.M., Jack arrived at Herold's and entered the office and saw Gregory and another man, whom he could not identify, working at the stove (T. 64, 69). Since Lemos admitted that he remained at Herold's until around 4:00 P.M. (T. 116), the court was entitled to infer that such unidentified man was Lemos. Shortly before 5:00 P.M., Jack reentered the office and saw Gregory and Lemos working at the stove. He saw Gregory wipe up the floor under the stove with a rag, then light a match and throw it into the port of the stove, which act was immediately followed by a puff and the fire appeared under the stove (T. 67).

On the 27th day of October, 1947, in the presence of appellant, Gregory informed O'Malley, an investigator, that he completed the installation of the stove, connected the tubing to the stove, ran the oil into the stove, ignited a match and threw it into the port of the stove and the fire occurred (T. 149-152), and neither Gregory nor appellant denied such statements to O'Malley (T. 140, 167).

When asked by the trial court to explain his presence at Herold's, Gregory said that since appellant had sold the stove, he was there to take care of things in case anything would happen or go wrong with the stove (T. 137-138).

Building contractor Wold testified that he instructed his men not to have anything to do with the installation of the stove and that they did not install it (T. 124).

Charles testified that Herold did not have any stove pipe and the stove pipe was to be furnished by appellant, and that Herold did not furnish it (T. 163, 165).

In view of the evidence, it is clear that appellant's employees, who had installed heaters for appellant in the past, were in possession of the stove from around 1:00 P.M. to shortly before 5:00 P.M. when the fire occurred, making the necessary connections for the installation of the stove, turning on the flow of the oil and igniting and throwing the match into the stove, which immediately resulted in the fire. What greater degree of possession and

control of the stove could anyone have had than such control and possession by appellant's employees?

2. Heating appliance is a dangerous instrumentality.

Unless heating equipment is properly installed, controlled and tested, it is a dangerous instrumentality,

Roselip v. Raisch (1946) 73 C.A. (2d) 125, 166 P. (2d) 340.

If a stove is properly installed, controlled and tested, it will not cause a building to take fire within seconds after a lighted match is tossed into it to ignite the stove.

3. Burden on appellant to show fire not caused by his negligence.

When the doctrine of *res ipsa loquitur* is applied, an inference of negligence arises against appellant and it becomes appellant's duty to show that the fire occurred without negligence on his part. Appellant has not offered any evidence to show what caused the fire under the stove in the area his employee Gregory had just wiped up, and Gregory's testimony that he did not know what caused the fire does not constitute a defense.

Williams v. Field Transportation Co. (1946) 73 A.C.A. 588, 166 P. (2d) 884, 887, Hearing granted 28 C. (2d) 696, 171 P. (2d) 722;

Meyer v. Tobin (1931) 214 Cal. 135, 4 P. (2d) 542;

Ireland v. Marsden (1930) 108 Cal. App. 632, 291 Pac. 912.

Further, a defendant cannot prevail as a matter of law on the basis of testimony as to the defendant's own conduct,

Druzanich v. Criley (1942) 19 C. (2d) 439, 122 P. (2d) 53;

Chutuk v. Southern California Gas Co. (1933) 218 Cal. 395, 23 P. (2d) 285.

or any other possible cause for the accident, which still leaves fairly open the possibility of the negligence originally to be inferred,

St. Clair v. McAlister (1932) 216 Cal. 95, 13 P. (2d) 924—negligence of other driver in collision;

Linberg v. Stanto (1931) 211 Cal. 771, 297 Pac. 9—turning to avoid other automobile.

At pages 7, 9 and 10 of his opening brief, appellant contends that there were a number of possible causes of the fire over which appellant had no control and that the doctrine of *res ipsa loquitur* is not applicable. In the absence of proof of interference by a third party, the liability of the appellant is established by the evidence that at the time of the destruction, the match, wiping rag, stove and stove area were under the control of his employee Gregory,

Roselip v. Raisch (1946) 73 C.A. (2d) 125, at 135, 166 P. (2d) 340.

The evidence does not show that any of the following acts suggested as causes by appellant occurred, namely: "* * * a defective flue, a burning cigaret, spontaneous combustion of a painter's rag * * * or by the either voluntary or careless act of a third person."

In *Roselip v. Raisch* (1946) 73 C.A. (2d) 125, it was stated at page 135 thereof:

> "No person in charge of a dangerous instrumentality can avoid his liability for an injury resulting from its mismanagement because out of a number of probable causes of the injury he may have concluded, and procured witnesses to testify, that the injury was due to cause A and not to cause B. That such instrumentality was under his control at the time of its destructive behavior establishes the liability of the operator in the absence of proof of successful interference by another."

and in *Wright v. Southern Counties Gas Co.* (1929) 102 Cal. App. 656, at page 665, the court stated:

> "In *Van Horn v. Pacific Refining & Roofing Co.,* 27 Cal. App. 105 (148 Pac. 951), the doctrine was applied, and in answer to the appellant's contention that it could not apply by reason of the possibility of some other person being liable, the court used the following language: 'But the appellant contends that because the third possibility exists, the doctrine of *res ipsa loquitur* cannot be given application. In support of this contention counsel for the appellant argues that the mere fact that persons other than the defendant, or its employees, were working in and about the building, and had access to the particular floor where this steam-pipe was located, would be sufficient to prevent the application of the rule, because some one or other of these might possibly have so struck or tampered with this pipe as to have caused the loosening of its cap to such an extent that it would be liable to blow off at any

moment under pressure. We think this argument, unsustained as it is by any semblance of evidence or proof tending to show such interference with this pipe or cap, carries the possibilities in cases of this kind entirely too far.' That was a case in which the plaintiff was injured by the blowing off of a cap placed insecurely upon a steam-pipe. The court further in its opinion goes on to say that if such possibilities are allowed to prevent the application of the doctrine of *res ipsa loquitur,* it would in effect entirely eliminate the doctrine."

Again, in *National Lead Co. v. Schuft* (1949 C.C.A. 8th) 176 F. (2d) 610, at 614, it was said:

"Beyond this, it is to be noted that, while National Lead argues that the possibility of gas having escaped from the pipes or jets used in connection with the conveyors, or of combustible fumes having been formed from the oil used in the bentonite furnaces, is an equally rational theory of proximate cause with that alleged by the plaintiffs, there is no evidence whatever of any such condition of escaped gas or formed oil-fumes having existed in the plant. The same is true of the suggestion that the fire may have been caused by a passing switch engine, and especially so since all the evidence in the record indicates that the fire originated inside the plant. No possible basis therefore can be claimed to exist for the contention that as a matter of law the theory of plaintiffs was not 'inconsistent with any other rational theory.'

"A theory of proximate cause resting in probative circumstances does not become a matter of speculation and conjecture by a mere sug-

gestion of other possible causes which are unsupported by any proved facts. *Sears Roebuck & Co. v. Peterson,* 8 Cir., 76 F. (2d) 243, 247; *Terminal Railroad Ass'n of St. Louis v. Farris,* 8 Cir., 69 F. (2d) 779, 785."

Meyer v. Tobin (1931) 214 Cal. 135, 4 P. (2d) 542.

On the other hand, the evidence established that the following acts suggested as causes by appellant, at pages 7, 9 and 10 of his opening brief, actually were performed by appellant's employee Gregory: "* * * a carelessly thrown match * * * or ignition of the Standard Oil floor hardener then being applied, which was known to be highly inflammable when exposed to normal heat * * *"

CONCLUSION.

The evidence shows that the fire was caused by the negligence of appellant in installing, controlling and testing the heater without taking any precautions against the fire hazard created by the fresh paint, and if the evidence does not support such a finding of specific negligence, then the doctrine of *res ipsa loquitur* is applicable because at the time of the negligent act and at the time of the accident the stove was under the exclusive control of appellant's employees, and such a fire does not ordinarily occur where such employees use proper care in installing, controlling, testing and igniting the heater. Therefore, an inference of negligence arises from such doctrine

against appellant and appellant has not offered any evidence to rebut such inference.

Therefore, it is respectfully submitted that the judgment in favor of each appellee should be affirmed.

Dated, San Francisco, California,
June 14, 1950.

Respectfully submitted,

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